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The Honorable Russell Decker
Senate Majority Leader
211 South, State Capitol
Madison, WI 53702

The Honorable Scott Fitzgerald
Senate Minority Leader
202 South, State Capitol
Madison, WI 53702

The Honorable Michael Sheridan
Speaker of the Assembly
211 West, State Capitol
Madison, WI 53702

The Honorable Jeff Fitzgerald
Assembly Minority Leader
201 West, State Capitol
Madison, WI 53702

Re: AB 895/SB 640 (Elections Reform Measure)

Dear Senator Decker, Senator Fitzgerald, Speaker Sheridan and Representative Fitzgerald:

I write today to express my concerns with portions of Assembly Bill 895/Senate Bill 640,[1] which attempt to change various sections of existing election law.

Before addressing specific provisions of the bill, it is important to address current law. Under current law, any qualified elector can show up on election day, cast a ballot, and have it counted. But with the ease of registering to vote also comes the potential for fraud, which is why rudimentary safeguards, such as the ability to challenge an elector's qualifications and certification requirements, are in place. It is also why reforms (such as identification requirements) are often discussed. Facilitating orderly elections with assurances that voters are qualified adult citizens of this state ensures that every lawful vote counts and no lawful vote is diluted by an illegally cast ballot.

AB 895 does not serve that goal, and it is not clear to me what problems this reform is trying to address. It makes changes to the voter registration law, yet registering to vote is easy under current law. It populates the registration list with unregistered voters, increasing the potential for fraud, when our desire should be to have an accurate list that is neither over inclusive nor under inclusive. It limits the ability of electors to challenge the qualifications of others – yet all a challenged elector must do to overcome the challenge is orally affirm his or her qualifications and there is no evidence this procedure is denying any lawful elector the right to vote. It creates new crimes and civil causes of action, making the courtroom as central to an

[1] Provisions of the legislation addressed in this letter relate to AB 895 as amended and reported out of the Joint Committee on Finance.

election as the polling place, thus jeopardizing the orderly administration of elections and chilling lawful and protected speech.

I believe that our election laws could be improved. Too often, I think, the potential for fraud jeopardizes confidence in elections and basic reforms such as photographic identification would benefit the system without impeding the right to vote. But the changes proposed in this bill neither enhance the right to vote nor protect against fraud. Instead, they make election fraud more likely, chill the lawful exercise of speech that is at the core of the First Amendment, and jeopardize the orderly administration of election laws.

I urge you to reject AB 895. A more specific explanation of my concerns follows.

Registration of Electors by the Government Accountability Board

A central feature of AB 895 is the authorization given to the Government Accountability Board (GAB) to facilitate initial registration of eligible electors. While the elector must confirm with the GAB that all information pertaining to the elector's registration is correct and accurate (by mail, by the internet, or by personal appearance), I am concerned that this upends the traditional responsibility placed on the individual elector to ensure that the elector is eligible to vote in an election. Placing additional responsibilities on the recently-established GAB, which will undoubtedly require additional resources in a time of economic stress, makes little sense, especially where, as in Wisconsin, registration of an elector to vote is a simple process and easily accomplished.

I am also concerned that by requiring the GAB to populate the statewide registration list with names of electors who are not qualified to vote (because they have yet to confirm their registration), there is a potential conflict with the Federal Help America Vote Act (HAVA). HAVA requires the state maintain "a single, uniform, official, centralized, interactive computerized statewide voter registration list … that contains the name and registration information of *every legally registered voter* in the State and assigns a unique identifier to each legally registered voter in the State …" 42 U.S.C. § 15483(a)(1)(A) (emphasis added). In an Orwellian twist, AB 895 would require *unregistered* voters to appear on the official voter registration list.

In addition, anytime the voter registration list is populated with names that are not valid registrants (whether unregistered because they are unconfirmed or because the list is not adequately maintained), there is a heightened potential for fraud on election day. This results because voters are not required to produce identification or proof of residency if they are on the registration list; all they need to state is a name and address, information that is easily accessible to all.

One minimal protection against this fraud is to require registering voters to sign a certification indicating they meet voter qualifications. While not a fail-safe mechanism to prevent all unlawful registration and voting, a signing requirement causes the applicant to more thoroughly consider his or her qualifications and is also powerful evidentiary proof that an

unlawful registration was intentionally made. Also, signing a statement acts as a guard against "identity theft" in registration: an individual is less likely to assume another's identity for the purpose of registration if their signature will accompany a document. After all, law enforcement may be able to identify who forged a document.

But AB 895 does not require voters who "confirm" a GAB-initiated registration to sign a confirmation. "Confirmations" of a GAB-initiated registration during the registration period may be made, for example, by the internet. The bill also appears to allow a person to "confirm" a GAB-initiated registration in-person at a polling place, after the close of the registration period. But the bill does not require these confirmations to include a mandatory signature. It only requires the filling out of a form that has not yet been developed and is not required by law to include a signed certification. This is unlike what is required under current law when an individual registers or changes his or her registration on his or her own initiative.

Thus, not only is the potential for fraud heightened, but key evidence now required that may be relevant to identifying suspects and prosecuting offenders is not required. This could make election fraud investigations and prosecutions more difficult.

Moreover, there is an increased potential for voter confusion. If AB 895 is enacted, a person may think he or she is registered because he or she has a driver's license and the DOT is required to transfer information to GAB. If GAB has not placed the unregistered individual on the registration list, on election day, that person will find out he or she is not eligible to vote. To be sure, the ability to register the day of an election will mean some of these qualifying electors will still be able to vote if they bring sufficient proof of residency. But those voters would be less likely to bring their proof to the polls as they would be today, since they are more likely to believe they are registered. Depending on what is ultimately required for an election day in-person confirmation of a GAB-initiated registration, this problem may extend to those individuals as well. In any event, the fact of same day registration undermines any argument that *any* of these provisions are necessary or advisable.

In essence, these provisions are nothing more than expensive or unfunded mandates that have no benefit (since registering to vote in Wisconsin even on the day of an election is easy), increase voter confusion, and increase the potential for election fraud.

Electronic Registration

AB 895 would also change current law by no longer requiring a signature of an applicant and a corroborating elector for all voter registrations (new registrations and changes). According to the bill, if an applicant has a driver's license or a DOT-issued identification card, he or she may register electronically, without a requirement to submit a signature or obtain the signature of a corroborating elector. While electronic registration forms would require applicants to fill out relevant information relating to an applicant's qualifications to vote, for the reasons stated above, the signature is important to prevent mistakes and prevent, investigate, and prosecute election fraud.

Absentee Voting

Under current law, all electors who cast an absentee ballot must sign a certificate on the absentee ballot envelope that the elector meets specific voting qualifications and must be witnessed by one adult citizen. AB 895 removes the certification and witness requirement with respect to in-person absentee voting. Thus, a relatively simple requirement under current absentee balloting rules is removed, and the opportunity for election fraud is enhanced.

In addition, under current law, an elector who requests an absentee ballot in-person or by mail must make a written application and sign the application. These requirements are deleted, magnifying the opportunity for election fraud. Combining the effects of these absentee provisions, AB 895 simply makes it easier for an individual to obtain another's absentee ballot and then submit the ballot in-person, without the need for a witness and without a certification.

Not only is oversight reduced because minimal fraud-control mechanisms are abandoned, but the remaining oversight of absentee balloting is further compromised by allowing multiple in-person balloting locations. Under current law, a municipality may designate a single alternative site for absentee balloting by electors of that municipality in lieu of the office of the municipal clerk. AB 895 permits a municipality to designate more than one alternative site for in-person absentee balloting by the electors of that municipality. This creates the potential for haphazard administration of the elections laws, stretches municipal resources in a time of resource shortages, and thus magnifies opportunities for electoral fraud. Again, the need for this reform is not apparent. Absentees can vote today anywhere – by mail, so long as they complete the proper certification and have a witness. Just as it is easy to vote in-person under current law, it is easy to submit an absentee ballot. It should not, however, be so easy to submit an illegal absentee ballot.

Finally, because time, place, and manner speech restrictions can apply in the vicinity of polling places, I am concerned that there is the potential that designating additional in-person absentee locations will further curtail political speech that is at the heart of the First Amendment if those locations are deemed to be polling places.

Criminalizing Deceptive Election Practices

AB 895 also prohibits any person, whether acting in an official capacity or otherwise, from intentionally deceiving a person regarding the date, time, place, or manner of conducting an election, the qualifications for voting or restrictions on eligibility of electors to vote in an election, or the endorsement of candidates by specified persons. Any person who violates these prohibitions with intent to prevent any person from exercising the right to vote could be fined not more than $100,000 or imprisoned for not more than 5 years or both. These prohibitions are overly broad with an unclear purpose, and they will chill the exercise of constitutionally protected speech. While the law would restrict the proposed crime to only those statements that are intentionally deceiving, honest mistakes may expose individuals to an investigation (you can not determine intent until there are interviews) and claims by political opponents that they have committed a serious felony. Under

such a threat, even nonpartisan organizations who seek to do nothing more than inform the public about their right to vote will think twice before speaking.

Let me illustrate an example of AB 895's overbreadth. This law, if enacted, might very well cover those persons who mislead voters about the legal action of the Department of Justice brought against the GAB in September 2008 to ensure a compliance with verification of voter registration information under the Help America Vote Act. Some claimed, falsely, that requiring the GAB to perform the required HAVA-checks would result in qualified electors being promptly removed from the registration list without further inquiry and rendering those persons unable to vote on election day. If AB 895 is enacted, only the speaker's intent and knowledge of falsity would be an issue for investigators and ultimately jurors to determine if the conduct is criminal. Probable cause on these facts may be found. While I believe criminal charges on these facts would not be a proper exercise of prosecutorial discretion, other district attorneys and future attorneys general could disagree. And certainly if the Legislature votes to enact AB 895 and criminalize such conduct, it has condoned such prosecutions. I offer this example by illustration to demonstrate that overly broad prohibitions place considerable discretion in the hands of enforcement authorities and may significantly chill not only the electoral process, but also commentary about public events.

The proper response to misinformation about voter qualifications or candidate endorsements is more speech, not criminal prosecution. While intentional misrepresentations are irresponsible, the idea that an individual should go to prison for five years and pay a $100,000 fine for misrepresenting an endorsement can only be described as Stalinist. If we trust democracy and the marketplace of ideas, the judge of such deception should be the voters at the ballot box, not individuals in a jury box.

Criminalizing Voter Intimidation and Suppression

AB 895 also broadens current protections against an individual making use of, or threatening to make use of, force, violence, or restraint in order to induce or compel a person to vote or refrain from voting at an election (election threats) by adding to the list prohibited acts "any tactic of coercion or intimidation". The bill also provides that no person may knowingly attempt to prevent or deter another person from voting or registering to vote based upon "fraudulent, deceptive, or spurious grounds or information" (voter suppression).

Words in statutes matter, and I urge you to reconsider the language that is being used here. The introduction of such strikingly broad and vague terms which can be enforced through criminal prosecutions is dangerous. Since violence or the threat of violence is already covered by current law, "any tactic of coercion or intimidation" will likely be interpreted as something less than that – possibly only speech. The provisions in the new voter suppression subsection are even more directly aimed at pure speech. Is every "October surprise" to be a crime? Applying AB 895, many could be considered spurious because they are false or groundless; many could be considered deceptive because they leave out essential facts. Most are intended to influence voting behavior.

Finally, these provisions and the penalties set forth in AB 895 are excessive and will work to suppress even permitted and encouraged speech.

When it comes to restricting speech, the Legislature should proceed carefully, mindful not only of the First Amendment, but also the democratic values underlying the right to free speech. These provisions do not reflect a deliberate consideration of these values.

Creating Private Rights of Action For Injunctive Relief

My concern about the bill's enforcement mechanisms go beyond the new and expanded speech crimes that are created. They also extend to the creation of private rights of action to seek injunctive relief.

With respect to the provisions addressing voter deception, suppression, intimidation, and the like, I am concerned that allowing a private right of action is an invitation to abuse. This is not a welcome development. The likelihood of politically motivated "strike" suits is high. GAB and other law enforcers serve as an important filter to weed out unmeritorious claims and their involvement – absent from AB 895 – would minimize frivolous court actions.

Moreover, the potential for litigation is heightened by the vague terminology employed and the prospect of recovering attorney fees. Individuals may very well bring cases to test the contours of the provisions in question. Then, many would use those decisions in an attempt to encourage district attorneys to engage in criminal prosecutions.

To the extent that the claims involve speech, an injunctive remedy is troubling. Enjoining speech, in all events but particularly in the days before an election, is a dangerous proposition that runs counter to fundamental notions of free speech protected by the First Amendment and the Wisconsin Constitution. During the November 2008 Election cycle, a temporary restraining order was entered by a circuit court and lifted two days later by the Court of Appeals, citing First Amendment concerns. While that action involved a defamation claim, the underlying First Amendment principles eschewing injunctions in the speech context should apply to efforts to enjoin types of speech covered in the bill.

Individual injunction actions are also problematic with respect to other aspects of AB 895. AB 895 would allow an elector to file an injunctive action to force election officials to comply with various posting requirements, to require the GAB to produce an election manual, and to enforce the "voter's bill of rights."

To be sure, it is important for elections officials to comply with various rules to facilitate the right to vote. When Department of Justice staff visited polling places in the November 2008 Election, some sites were not in compliance with posting requirements and when chief inspectors were informed of a shortcoming, they corrected the problem. When an elector raised a complaint, we understand the same cooperation resulted.

Going to court should not be available as a first step. But with the prospect of attorney fees recovery, and no need to exhaust administration remedies, it will become the first step for many. AB 895 thus shifts authority for orderly administration of the election laws from the GAB and municipal clerks to circuit judges, and moves the judicial enforcement of election laws from actions initiated by the Department of Justice and District Attorneys to private citizens. It is not necessary to allow an elector to go directly to court. In an unusual case where a chief inspection officer was obstinate in the face of an elector's valid complaint and a reminder by GAB or the Department of Justice, state prosecutors have the authority to seek injunctive relief.

Moreover, some provisions of the voter's bill of rights involve issues that endanger the orderly tabulation of ballots. For example, AB 895 would give every qualified elector the right to "[c]ast a ballot using voting materials or equipment that enables the ballot to be counted accurately." If a qualified elector can seek an injunction to enforce this right, then the efficacy of voting equipment becomes, not a matter for election officials, but for a court to determine without deference to election authorities. If these actions are brought on the eve of election or election day, this problem is magnified as the orderly administration of elections may be jeopardized. Chaos could result.

While it is perfectly understandable that some or all of the private rights of action created in the bill be enforceable in some manner, it is less clear why these items would not be appropriate for enforcement by complaints to the GAB and judicial review through chapter 227 of the Wisconsin Statutes. The state agency charged with administering elections in the state (or at least with certain oversight responsibility over the local administration of elections) is in a superior position to the courts to address those complaints in a uniform manner.

In sum, the private right of actions for injunctive relief contained in AB 895 does more to encourage abuse than to encourage compliance.

Challenging Unqualified Electors

Under current law, any elector may challenge for cause the right of any other elector to vote at a polling place if the electoral challenger knows or suspects that the challenged elector is not a qualified elector. Under AB 895, as amended, only an elector who resides in the same county as the one in which a challenged elector resides may challenge the ballot. As with other provisions of AB 895, this magnifies the opportunities for election fraud. Challenges and the potential of challenges act as a safeguard against election fraud.

There is also no good public policy reason to require that those who attempt to ensure that only qualified electors cast ballots be from the same county as those who attempt to violate our election laws as unqualified electors. A qualified elector can simply defeat any challenge by affirmation of his or her qualifications. To my knowledge, there is no widespread abuse of challenges, and there is no indication that any qualified elector has ever had his or her right to vote denied based on current law.

AB 895 also sets up an odd inconsistency in election law. To register someone else to vote, a special registration deputy must only be a qualified elector in the State of Wisconsin and can register new voters anywhere in this state. Yet those who can raise questions as to the propriety of those registrations are restricted to certain counties in an unreasonable manner.

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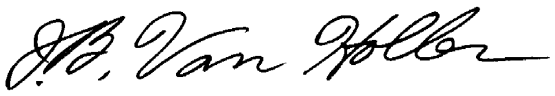
I appreciate the opportunity to provide my comments on AB 895/SB 640.

Sincerely,



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JBV:RPT:KMS/pss

c: Honorable James E. Doyle, Jr., Governor
Honorable Members, Wisconsin Legislature
Kevin J. Kennedy, Government Accountability Board